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No. 692

In the Supreme Court of the United States

October Term, 1944.

JAMES T. SPENCER, ADMINISTRATOR OF THE ESTATE OF JACKSON BARNETT,
Petitioner,
vs.
GYPSY OIL COMPANY, A CORPORATION; GULF OIL COMPANY, A CORPORATION; F. A. GILLESPIE, *ET AL., Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF *CERTIORARI* AND TO HIS BRIEF IN SUPPORT THEREOF.

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Petitioner's petition for *certiorari* will have to be denied, because, as we will hereafter establish, such petition, in the final analysis, merely calls for a review of the evidence herein or inferences drawn from it, and this court has repeatedly held that it will not grant a writ for such purpose.

The United States, which for a time was a party to this action, obviously concluded that there was no merit in petitioner's claims and that the same were untenable. On February 20, 1939, about three months after the commencement of this action, the United States intervened therein and took a position on behalf of petitioner or in accord with his

claims. Thereafter, pursuant to a pre-trial conference, the United States filed a brief in support of the admissibility upon the trial of the case of evidence as to the alleged mental incompetency of Jackson Barnett on March 5, 1912, the date of the execution of the oil and gas lease involved herein. Thereafter, the District Court advised the parties that upon the trial of the case it would hold such evidence inadmissible. Thereafter, on June 26, 1942, the United States moved for, and was granted, leave to withdraw its complaint in intervention, and thereby abandoned petitioner. (R. 614-616) Subsequently, the District Court, and later the Circuit Court of Appeals, held petitioner's claims were without merit and untenable. Apparently, petitioner's strategy is that constant and repeated reiteration of his claims might somehow, somewhere, or at some time eventuate in their adoption.

Petitioner seems unable to resist making inaccurate statements of fact or qualifying same to fit the law, and *vice versa*, but, in spite of his indulgence in this field, he winds up with misfits. Some outstanding examples of petitioner's handiwork with the factual matters herein are as follows:

1. Petitioner repeatedly asserts that it is admitted that on March 5, 1912, the date of the execution of the oil and gas lease involved herein, Jackson Barnett was mentally incompetent. This is inaccurate. On the contrary, respondents, and each of them, have at all times maintained that Jackson Barnett on said date was mentally competent. Moreover, the mental competency of Jackson Barnett on said date was one of the pivotal issues of fact involved in the action or actions in which the judgments or decrees which are attacked by petitioner were made and entered. (R. 72, 131, 169, 208, 352, 366, 403, 422, 441, 506)

2. Petitioner repeatedly asserts that it is admitted that the aforesaid judgments or decrees were void and invalid. This is inaccurate. On the contrary, respondents have at all times mentioned, and still maintain, that said judgments or decrees were and are good and valid. (R. 351, 354, 363-365, 398, 433-435, 443, 444, 500, 509-510)

3. Petitioner repeatedly asserts that it is admitted that the oil and gas lease involved herein was and is void or invalid. This is untrue. On the contrary, respondents have at all times maintained, and still maintain, that said oil and gas lease was and is good and valid. (R. 147, 148, 169, 170, 208, 209, 351, 366, 367)

4. Petitioner repeatedly asserts that it is admitted that the aforesaid judgments or decrees were and are merely and solely consent decrees or judgments, entered merely and solely *pro forma* upon the compromise agreement involved herein and without any independent judicial inquiry and determination on the part of the District Court which made and entered the same. This is inaccurate. On the contrary, respondents have at all times maintained, and still maintain, that, while said judgments or decrees were initiated by said compromise agreement, the same were not made and entered until the District Court had made all necessary independent judicial inquiry and determination to render and constitute said judgments or decrees *res adjudicata* of both the issues of law and of fact involved in the case or cases in which the same were made and entered. (R. 353, 354, 425, 426, 531, 533) Moreover, both the District Court, in its findings of fact herein, as we will hereafter show, and the Circuit Court of Appeals, in its opinion, found and held that said judgments or decrees were not made and entered until the District Court had made all necessary independent ju-

dicial inquiry and determination to render and constitute said judgments or decrees *res adjudicata* of both the issues of law and of fact involved in the case or cases in which the same were made and entered. (R. 619, 826-827) Hereafter we will show that, in the final analysis, petitioner's present petition is bottomed upon his inaccurate and wholly insupportable assertions with respect to the instant facts.

5. Petitioner repeatedly asserts that the Circuit Court of Appeals, in its opinion herein, conceded that Jackson Barnett was mentally incompetent on March 5, 1912, and that the oil and gas lease involved herein was and is void. Such assertions constitute only partial truths. On the contrary, the only concessions made by the Circuit Court of Appeals were "for the purpose of this opinion." (R. 827) In other words, the Circuit Court of Appeals was merely saying that even if it be assumed that such mental incompetency existed, or that if it be assumed that said lease was void, the aforesaid judgments or decrees were nevertheless *res adjudicata* of all the issues, both of fact and of law, involved in the case or cases in which the same were made and entered, and that none of the issues of fact or of law involved in said case or cases could be relitigated for the purpose of establishing the invalidity of said judgments or decrees, or that any of said issues, either of law or of fact, were erroneously decided or adjudicated by said judgments or decrees.

The Circuit Court of Appeals, in its opinion herein, has made a brief, clear and forthright statement of the facts necessary to a consideration of petitioner's present petition, and we do not deem it necessary to repeat such facts herein. However, we will hereafter make a more detailed statement than was made by the Circuit Court of Appeals of certain

facts which render petitioner's present petition absolutely without merit and untenable. Aside from the many inaccurate and unfounded statements of fact made by petitioner, to some of which we have heretofore adverted, the only variations in petitioner's statement of facts and the statement of facts of the Circuit Court of Appeals consist merely of immaterial factual details and rhetorical color and amplification.

In so far as this action is concerned, petitioner is in a sense a mere interloper, because he is merely prosecuting this action as administrator of the estate of Jackson Barnett, the full-blood Creek Indian involved herein, and because the subject-matter of this action, being restricted Indian property, is not property subject to administration by any probate court of Oklahoma. Petitioner has no duty with respect to such property, and his interest is not hard to see. Such interest is not wholly charitable. The proper parties to maintain this action are the United States or the heirs of Jackson Barnett. See *Barnard* v. *Bilby, et al.*, 68 Okl. 63, 171 Pac. 444; *Bilby* v. *Noble*, 106 Okl. 302, 234 Pac. 198; and *March, et al.*, v. *Peter, et al.*, 179 Okl. 207, 64 P. (2d) 912.

In the District Court, petitioner undertook to attack the judgments or decrees which are involved herein, and which were made and entered more than nine years prior to the commencement of his action, upon the following grounds:

1. That said judgments or decrees were procured by fraud.

2. That said judgments or decrees were and are void because the same were merely and solely entered *pro forma* upon the compromise agreement involved herein and without any independent judicial inquiry and determination on

the part of the District Court which made and entered the same; and

3. That, because said judgments or decrees were and are void, for and upon the two aforesaid reasons and grounds, the same were not and are not *res adjudicata* of the alleged mental incompetency of Jackson Barnett on March 5, 1912, or of the alleged invalidity of the oil and gas lease involved herein, and, consequently, that he is not precluded from now litigating, and is free to now litigate, the question of the fact of such alleged incompetency and of the numerous questions of both fact and law necessary to a determination of the alleged invalidity of said lease.

It is noteworthy, that in the District Court petitioner did not initiate the question of any insufficiency of the court proceedings immediately preceding the making and entering of the judgments or decrees under attack. (R. 6-39) It was the United States, in its petition of intervention, that first interposed this particular ground of attack. (R. 114-115) And we have heretofore seen that the United States, evidently realizing there existed no ground or grounds justifying the vacation of said judgments or decrees, withdrew from the case. (R. 614-616)

The District Court found herein, as a matter of fact, that the judgments or decrees attacked by petitioner were not "obtained as the result of any fraud, actual or legal," and that said judgments or decrees and the compromise agreement and its approvals, which preceded the making and entering of said judgments or decrees, were "free of fraud and were made and entered into in good faith," and that there was no evidence which indicated or tended to prove that any person "had performed or done any act or thing that would or should have caused the court to refrain

from entering the judgment it did enter." (R. 620) In the Circuit Court of Appeals petitioner did not rely upon any claim of fraud, and does not now present any such claim. Consequently, the first of petitioner's aforesaid grounds of attack is out of this case. But notwithstanding this, petitioner, by mere statement and inuendo, attempts to impute corrupt intent and purpose to every single important transaction, both private and governmental, involved in this case, including, among other things, the approval by the Secretary of the Interior of the oil and gas lease involved herein, the conduct of the United States and its officials in the case or cases in which the judgments or decrees under attack were made and entered, the making and entering into, and approval by the Attorney General of the United States and the Secretary of the Interior of the compromise agreement involved herein, and the withdrawal of the United States as a party to this action. According to petitioner, everything from the beginning to now which stands in his way was either fraudulent or erroneous. However, it is impossible for us to believe that there can be such an unbroken chain of fraud or error.

A mere casual glance at the third of petitioner's aforesaid grounds of attack discloses that the same is wholly dependent upon the tenability of the second of his aforesaid grounds of attack. And petitioner admits herein that unless he can maintain and sustain the second of said grounds of attack, his third ground of attack is untenable. (Petitioner's brief herein, p. 35.) Consequently, in the final analysis, the question is whether there is any merit in the second of petitioner's aforesaid grounds of attack. The Circuit Court of Appeals held there was not, and we think it was undoubtedly right.

The gist of the opinion of the Circuit Court of Appeals is embraced in the last five paragraphs thereof, which are as follows:

"Appellant recognizes that to be successful he must get around the judgment in Consolidated No. 216 Equity quieting appellees' title to the oil and gas lease. This he seeks to do on the ground that the judgment is void because it constituted a consent decree. It is argued that neither a legal guardian, a guardian *ad litem*, nor a next friend of an incompetent person can consent to a compromise judgment, and that such a judgment is absolutely void. On the other hand, appellees urge with considerable force that appellant is without authority to maintain this action because the funds in question are restricted and as such do not constitute assets subject to administration by an administrator in a state court of competent jurisdiction. This contention is not without merit. Numerous other questions are raised, and a great number of authorities are cited in support thereof.

"In the view we take of the matter, it is not necessary to the determination of the controversy to consider or pass upon these many issues. It is our opinion that the decree of the court was not a consent decree; that it was a judicial determination of the issues involved in the case in which it was entered, and is a valid and binding decree, and constitutes an effective bar to the prosecution of this case.

"This is not a case in which the parties agreed as to the judgment which should be entered, submitted it to the court, and had the court *pro forma* enter the judgment upon which they had agreed, without an independent judicial inquiry and determination of the issues involved in the case. The order of June 13 recites that the compromise agreement was submitted to the court for its inspection and that having examined the same, as well as the petition of the guardian *ad litem*

'and being otherwise sufficiently advised,' the court adjudged and decreed that it be approved. The compromise settlement contained not only the agreement of the parties but also the facts in the case, together with the questions of law. It follows, therefore, that when the court made its examination of the issues it had before it all of the facts and questions of law set out in the agreement. In addition to this, the court informed itself outside of the facts set out in the written stipulation, and from all this determined the nature of the judgment which should be entered. The testimony of John M. Goldsberry and James B. Diggs in this case establishes that matters outside of the settlement agreement were considered by the trial court in reaching its judgment quieting the title.

"It may be conceded for the purpose of this opinion that Jackson Barnett was mentally incompetent and could therefore not execute a valid oil and gas lease. It may also, for the same purpose, be conceded that the court erred in Consolidated Equity No. 216 in concluding that the ratification of the lease by the representatives of Barnett and its approval by the Attorney General and the Secretary of the Interior gave it validity. The fact, however, remains that the court did conclude that all these things that were done made the lease a valid and subsisting oil and gas lease. After a consideration of all these matters, the court entered judgment quieting appellees' title to the lease. The court had jurisdiction of the subject-matter and of the parties to the controversy. Jurisdiction of the subject-matter includes power to determine with binding effect every justiciable issue involved. Such jurisdiction is not limited to deciding issues correctly. *Swift & Co.* v. *United States*, 276 U. S. 311, 48 S. Ct. 311, 72 L. ed. 587. An erroneous decision is just as binding as a correct one if no appeal is taken therefrom.

"Many other reasons are given by appellant why nothing that was done prior to the judgment in Consoli-

dated Equity No. 216, or why nothing done in that case, could give validity to the lease which it is asserted was void *ab initio.* It would serve no useful purpose to engage in a detailed discussion of these various points, because invariably we come back to the fact that the trial court in Consolidated Equity No. 216 concluded and decided that the lease was valid and quieted appellees' title thereto. This judgment became final and is binding upon all parties interested in this lease." (R. 826-827)

Obviously, what the Circuit Court of Appeals meant by "consent decree" is a decree which is merely made and entered *pro forma* upon a compromise agreement or stipulation for decree, without any independent judicial inquiry and determination on the part of the court making and entering the same, and not a decree which, while initiated by an agreement or stipulation, was made and entered, not merely and solely *pro forma* upon the agreement or stipulation, but was made and entered after and pursuant to an independent judicial inquiry and determination on the part of the court making and entering the same with respect to the wisdom and propriety thereof. In 34 C. J., p. 130, Sec. 331, the author says:

> " * * * Where, however, the adjudication is one which is actually made by the court, after due consideration and investigation, although the parties superadd their consent thereto, it is more than a mere contract *in pais,* and is not a judgment by consent."

The burden was upon petitioner to prove his claim that the judgments or decrees which he attacks were merely and solely entered *pro forma* upon the compromise agreement involved herein, without any independent judicial inquiry and determination on the part of the District Court. How-

ever, petitioner only produced one witness in an effort to make such proof, and that witness, who was Mr. John M. Goldsberry, the United States District Attorney at the time of the making and entering of said judgments or decrees, wholly fails to support petitioner. In fact, Mr. Goldsberry destroyed the possibility of any such proof. Notwithstanding the failure of petitioner to sustain his aforesaid burden, respondents produced evidence which definitely and positively controverts petitioner's claim.

Naturally, the evidence bearing upon petitioner's instant claim is not as full, complete and definite as we would wish, because the witnesses were undertaking to testify about something that occurred or did not occur approximately thirteen years prior to the giving of their testimony. But whatever may be said about the evidence with respect to this matter, it cannot possibly be said that there is any evidence that the aforesaid judgments or decrees were merely and solely entered *pro forma* upon the compromise agreement involved herein and without any independent judicial inquiry and determination on the part of the District Court which made and entered the same.

Mr. Goldsberry testified that he recollected being in court at the time of the making and entering of the judgment or decree of July 11, 1929, but his recollection of what took place was hazy; that he thought Judge Diggs, attorney for the Gypsy Oil Company, Mr. Schwabe, one of the attorneys for the next friend and also for the guardian *ad litem* of Jackson Barnett, and Mr. Wills, who represented Mid-Continent Petroleum Corporation, were present; that he didn't r e c a l l whether Mr. Ramsey, who represented Cushing Gasoline Company, was present; that it was his recollection that no witnesses were sworn to testify; that

he could not definitely answer that no evidence of any kind or in any form was presented to the court; that he did not recollect what documentary evidence, if any, was submitted to the court; that he did recall that Judge KENNAMER "had some conversation or some inquiry with Judge Stuart, who was the guardian *ad litem,* and naturally I suppose with the other attorneys who were present"; that he also recollected that the court gave him some instructions with reference to the disposition of the consideration for the settlement; and that all he meant to testify to was that according to his recollection no witness was sworn and examined by the lawyers. (R. 672-677)

Mr. James B. Diggs, who was attorney for the Gypsy Oil Company, testified, as a witness for the respondents, that the judgment or decree of July 11, 1929, was entered in open court; that he was present, and that, according to his recollection, Mr. George S. Ramsey, attorney for the Cushing Gasoline Company, Judge Stuart, the guardian *ad litem,* either Mr. Denton or Mr. Wills, attorneys for the Mid-Continent Petroleum Corporation, Mr. George Schwabe, Mr. Rayburn Foster and Mr. Coakley, attorneys for the next friend and the guardian *ad litem,* were also present; that the compromise agreement, or one of the quadruplicate copies thereof, the letter of approval of Mr. Dixon, Acting Secretary of the Interior, the approval of the Department of Justice, the appointments of Mr. Hall and Mr. McCallon, as guardians of Jackson Barnett, an incompetent, by the County Courts of Creek and Okmulgee Counties, Oklahoma, respectively, were presented to the court; that Mr. Lytle, attorney for H. U. Bartlett, and either Mr. Goldsberry, the United States District Attorney, or Mr. Stivers, his assistant, were also present; that Judge Stuart presented the motion for compromise; that when Judge Stuart presented

same, the court, in substance, remarked: "Should this be approved, or do you agree to it"; that Judge Stuart replied, "under all the circumstances I think that the agreement should be approved"; and that the court inquired of the other attorneys as to whether they thought the settlement should be approved, and that they all indicated they thought so. (R. 677-684)

The first of the judgments or decrees attacked by petitioner is dated June 13, 1929, and appears at page 102 of the record. It is simply entitled "Order," and not Consent or Compromise Order, Judgment or Decree. It recites that the cause came on for hearing upon a petition for approval of the compromise agreement, which petition appears at pages 100-102 of the record. It recites the statements of said petition, that the compromise agreement was submitted to the court for its inspection, that the court had examined the same and had examined the petition for the approval thereof, and that the court was "otherwise sufficiently advised." And in said order it was "ordered, adjudged and decreed that said compromise agreement be, and the same is hereby approved." Said order also ordered that the consideration for said compromise agreement was not to be payable until it was approved by the Secretary of the Interior and the Department of Justice of the United States. Said order concludes with these words: "Done in open court, this 13th day of June, 1929." And, in addition to said order, the District Court, on said 13th day of June, 1929, endorsed his approval upon said compromise agreement. (R. 100-104, 107, 108, and 109)

The second of the judgments or decrees attacked by petitioner, being the only other judgment or decree attacked by him, is dated July 11, 1929, and appears at page 105 of

the record. It is simply entitled "Final Decree," and not Consent or Compromise Order, Judgment or Decree. It recites that the cause came on for hearing upon a regular day of a term of the court; that all of the parties in said cause, including the United States of America, appeared by their counsel; that said compromise agreement had been fully and completely executed, authorized, ratified, confirmed and approved; and that it appeared to the court that it was to the best interest of Jackson Barnett to enter into said compromise agreement. Accordingly, in said final decree, the court again approved and confirmed said compromise agreement, and, pursuant thereto, ordered, adjudged and decreed that petitioner's bill in Cause No. 216 Equity, and the guardian *ad litem's* counterclaim in Cause No. 260 Equity be "dismissed with prejudice," and that the titles of the respective respondents in and to the oil and gas lease involved herein be quieted. (R. 105-107)

The District Court, in its seventh finding of fact, found as follows:

> "Said compromise agreement on the 13th day of June, 1929, was submitted to this court, then presided over by the Honorable FRANKLIN E. KENNAMER, as judge thereof, for approval by the guardian *ad litem* with the statement that the compromise would be to the best interest of Jackson Barnett and with the recommendation that it be approved *and, after hearing evidence therein in open court as to whether the compromise agreement was to the best interest of Jackson Barnett and finding that it would be, the same was approved in open court by the judge thereof,* which approval was conditioned on the approval of the compromise agreement by the Secretary of the Interior and the Attorney General of the United States and on the payment of $35,000.00 to be paid in the manner prescribed in the compromise agreement and by the order

of the court of June 13, 1929. On July 11, 1929, the cause came on further to be heard in open court for final judgment and decree, and all parties being present by their attorneys, the compromise agreement and said cause were submitted to the court for approval and final decree, and it appearing that said compromise agreement had been approved by the Attorney General of the United States and the Secretary of the Interior of the United States, *and the court finding from evidence in open court that such compromise agreement and final decree would be to the best interest of Jackson Barnett,* and it further appearing that the consideration for said agreement had been paid in the manner agreed upon and as directed by the court, the court finally approved said compromise agreement and entered the final decree in such Consolidated Cause No. 216 Equity bearing date of July 11, 1929, quieting the title to these answering defendants or their predecessors in title to the separate parcels of the leasehold estate of which they were owners by deeds of assignment and the judgment was duly entered of record." (R. 619) (Italics ours.)

Thus, we have both the District Court and the Circuit Court of Appeals finding and holding that the judgments or decrees attacked by petitioner were not merely and solely entered *pro forma* upon the compromise agreement involved herein and without any independent judicial inquiry and determination on the part of the District Court which made and entered the same. This dual finding and holding sweeps out from under petitioner the whole and entire factual foundation upon which, in the final analysis, is predicated his petition for *certiorari.*

It is thoroughly established that this court will accept concurrent findings of a District Court and the Circuit Court of Appeals as establishing facts found, and will not grant

a writ of *certiorari* merely to review the evidence or inferences drawn from it. See *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 82 L. ed. 374; *United States* v. *O'Donnell, et al.*, 303 U. S. 501, 82 L. ed. 980; and *General Talking Pictures Corp.* v. *Western Electric Co., Inc., et al.*, 304 U. S. 175, 82 L. ed. 1273. The second and third paragraphs of the syllabus to the last of said cases are as follows:

> "The Supreme Court of the United States will not grant a writ of *certiorari* merely to review the evidence or inferences drawn from it.
>
> "Concurrent findings of both courts below will not be disturbed by the Supreme Court unless plainly without support."

It might not be amiss to call the court's attention to the following evidence appearing in the record:

Respondents' Exhibit 10 was a letter dated June 17, 1929, from A. J. McMillan, Acting Superintendent of the Five Civilized Tribes, to the Commissioner of Indian Affairs, transmitting the compromise agreement involved herein for consideration for approval. In said letter the approval of said compromise agreement was recommended. Said letter contains this statement: "This office has at all times been of the opinion that the lease referred to is, in all respects, a valid lease, and we understand that is the position which your office has taken in this matter." (R. 817-818)

Respondents' Exhibit 2 was a letter dated June 25, 1929, from Jos. M. Dixon, First Assistant Secretary of the Interior, transmitting to the Attorney General of the United States the aforesaid compromise agreement for consideration for approval. In said letter it was stated:

> "This Department believes that the best interests

of Jackson Barnett will be served by the approval of the agreement. However, in view of previous correspondence with your department relative to the case and the matters involved, and of the intervention in the case by the United States in behalf of Jackson Barnett, and of the terms of the compromise agreement, this Department, before acting in the matter of the approval of said compromise agreement, will be pleased to have your advice as to whether you have any objection to the approval of the compromise agreement. If, in your opinion, it is to the best interests of Jackson Barnett and the others concerned that the compromise agreement and settlement be approved, this Department, upon your advice to that effect and the return of the inclosed papers to this Department, will endorse its formal approval upon the compromise agreement." (R. 790-791)

Respondents' Exhibit 3 was a letter, dated June 27, 1929, from William D. Mitchell, Attorney General of the United States, to Ray Lyman Wilbur, Secretary of the Interior, approving the aforesaid compromise agreement. In said letter it was stated:

> "The compromise agreement in settlement of the case-made and entered into by and between the parties plaintiff and parties defendant, and referred to in your letter, has been approved. This accords with the views expressed in your letter. This settlement has been given consideration by this Department, and the opinion has been reached that its approval is for the best interest of Jackson Barnett and the parties concerned." (R. 792)

Respondents' Exhibit 11 consists of certain excerpts from hearings before a sub-committee of the Committee on Indian Affairs, United States Senate, Seventieth Congress, Second Session, pursuant to S. Rep. 79. These excerpts dis-

close that Mr. Pierce Butler, Jr., a Special Assistant to the Attorney General, had on March 2, 1929, made a report of his findings of fact and conclusions of law, together with his recommendations, in connection with various matters involving Jackson Barnett and his properties, and that on March 4, 1929, Mr. Jno. G. Sargent, the then Attorney General, approved said findings of fact, conclusions of law and recommendations. The following are parts of three excerpts from Mr. Butlers' report:

> "It was under this section that Barnett lands were leased and his royalties accumulated. The proper construction of the act is important. Authority to make the Barnett donations was claimed by the Secretary under this act. Officers of the Interior Department in charge of Indian Affairs thought that a decision against the Secretary's authority to approve an incompetent's disposal of his royalties would establish lack of authority to approve an incompetent's oil lease. And promptly after the guardian's appointment was held void a suit was brought in United States District Court, Northern District of Oklahoma, by a self-appointed next friend to cancel the Barnett lease upon the claim that Barnett being incompetent and the appointment of his guardian void, there could be no valid approval of his lease. Many leases might be so attacked. If such leases may be set aside upon proof of the incompetence of the Indian at the date of the lease a vast field of litigation will be opened. Such cases would afford possibilities of great gain and Indians' rights and property of enormous value would depend on the testimony of ignorant and venal persons concerning an Indian's competency at some past time.
>
> * * * * * * * *
>
> "The lease of Barnett was approved by the Secretary and therefore valid whether Barnett was competent or incompetent.
>
> * * * * * * * *

"I advise that:

"*1.* The oil lease of Barnett's allotment is valid." (R. 819-821)

Respondents' Exhibit 9 is the order of the County Court of Creek County, Oklahoma, appointing C. B. McCallon as guardian of the estate of Jackson Barnett. (R. 813-816) The letters of guardianship which were issued pursuant to said order appear at pages 385-386 of the record. Respondents' Exhibit 6 is the petition of C. B. McCallon, as guardian of the estate of Jackson Barnett, to the County Court of Creek County, Oklahoma, for authority to enter into the compromise agreement involved herein, and the order of that court granting such authority. (R. 796-803) Respondents' Exhibit 8 is the order of the County Court of Okmulgee County, Oklahoma, appointing George Riley Hall guardian of the estate of Jackson Barnett. (R. 810-813) The letters of guardianship which were issued pursuant to said order appear at pages 384-385 of the record. Respondents' Exhibit 7 is the petition of George Riley Hall, as guardian of the estate of Jackson Barnett, to the County Court of Okmulgee County, Oklahoma, for authority to enter into said compromise agreement, and the order of that court granting such authority. (R. 803-809)

It is quite apparent that petitioner's basic reliance is upon those cases which hold that an *infant* or *mentally incompetent person* is not bound by a judgment or decree rendered against him upon the mere consent or stipulation of his *parent, next friend, guardian,* or *guardian ad litem,* and without the judicial sanction of the court. However, the most that such cases hold is that a court cannot enter a valid judgment or decree against a minor or a mentally incompetent person merely upon the consent or stipulation of

the minor's or the incompetent person's *parent, next friend, guardian,* or *guardian ad litem,* and it must in some way ascertain and conclude for itself that the judgment or decree is for the best interest of the minor or mentally incompetent person. None of said cases prescribe any exact or definite procedure by which the court must arrive at such ascertainment and conclusion, or hold that there must be a trial of the case or that witnesses must be sworn and their testimony given. All that is required is that the court, for itself, determine whether a judgment agreed to is reasonable and proper and for the best interest of the minor or mentally incompetent person; and this, according to the evidence of both petitioner and respondents, the District Court herein did before making and entering the judgments or decrees under attack. Moreover, under the evidence before the District Court, that court most certainly would not have been justified in concluding that any particular prerequisite to the rendition of said judgments or decrees was omitted.

If it were a condition precedent to the entry of a judgment for or against a minor or mentally incompetent person pursuant to a compromise agreement, that the court have witnesses sworn, their testimony presented, and determine the merits of the issues involved, as upon an ordinary trial, the same would render settlement by agreement of litigation to which such persons were parties practically impossible. Because, if the court, perchance, were of the opinion that the minor or mentally incompetent person should prevail, it could not reasonably and in good conscience approve of any judgment to the contrary, and, if, perchance, it were of the opposite opinion, good morals would preclude it from being a party to paying a consideration in settlement of an unfounded action. As we have hereinbefore stated, none of the authorities support the assertion or

claim of any such condition precedent, and respondents maintain that petitioner's contention for the application of any such condition is quite unreasonable, if not ridiculous.

In the case of *Thompson* v. *Maxwell Land Grant & R. Co.*, 168 U. S. 451, 42 L. ed. 539, decided in 1897 and which has been since said time, and still is, the leading case on the subject involved, this court said:

> "That infants are bound by a consent decree is affirmed by the authorities, and this notwithstanding that it does not appear that a prior inquiry was made by the court as to whether it was for their benefit. In 1 Dan. Ch. Pl. & Pr. 163, it is said:
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> > 'Although the court does not usually, where infants are concerned, make a decree by consent, without an inquiry whether it is for their benefit, yet when once a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made that it would be for their benefit; and in the same manner an order for maintenance, though usually made after an inquiry, if made without, would be equally binding.' (In support of these propositions many authorities are cited in a note.) 'An infant defendant is as much bound by a decree in equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it; such as fraud, collusion, or error.'
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> "In *Walsh* v. *Walsh*, 116 Mass. 377 (17 Am. Rep. 162), a decree had been entered as follows: 'And the plaintiff and the defendants, * * * Thomas Keyes, * * * and also in his capacity of guardian *ad litem* of Bridget Walsh and William Walsh, consenting to the following decree; and this court being satisfied upon the repre-

sentations of counsel that the decree is fit and proper to be made as against the said Bridget and William; it is thereupon ordered and adjudged and decreed,' etc. On a bill of review filed by the minors this decree was challenged, among other reasons, on the ground that it appeared to have been made by consent of their guardian *ad litem* and upon the representations of counsel without proof. The court decided against the contention, and speaking in reference thereto, through Mr. Chief Justice GRAY, said:

> 'An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. *Tillotson* v. *Hargrave*, 3 Madd. 494; *Levy* v. *Levy*, Id. 245. And a compromise, appearing to the court to be for the benefit of an infant, will be confirmed without a reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud. *Lippiat* v. *Holley*, 1 Beav. 423; *Brooks* v. *Lord Mostyn*, 33 Beav. 457, and 2 De G. J. & S. 373.
>
> 'If the court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. *Wall* v. *Bushby*, 1 Bro. Ch. 484; 1 Dan. Ch. Pl. & Pr. 164. The case falls within the general rule, that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehearing, appeal, or review. *Webb* v. *Webb*, 3 Swanst. 658; *Harrison* v. *Rumsey*, 2 Ves. Sr. 488; *Bradish* v. *Gee*, 1 Ambl. 229; *s. c.*, 1 Kenyon K. B. 73; *Downing* v. *Cage*, 1 Eq. Cas. Abr. 165; *Toder* v. *Sansam*, 1 Bro. P. C. 468; *French* v. *Shotwell*, 5 Johns. Ch. 555.'

"Ordinarily, indeed, a court before entering a con-

sent decree will inquire whether the terms of it are for the interest of the infants. It ought in all such cases to make the inquiry, and because it is its duty so to do it will be presumed, in the absence of any showing to the contrary, that it has performed its duty. In this case, while the decree fails to recite the making of such an inquiry, there is nothing to indicate that it was not made; the circumstances tend strongly to show that it was in fact made, and the finding is that the conclusion reached by the chancellor as to the advisabilitiy of the settlement was a sound exercise of his discretion. It is true the findings show that this decree of September, 1866, was not made by the personal procurement, knowledge, or consent of said Scheurick or Guadalupe Bent, and the fact of the entry thereof was unknown to them for several years thereafter. They also show that there is no pleading, order, or proceeding of record disclosing whether or not any inquiry was made by the court; but it does appear that the parties plaintiff, including the infants, were represented by counsel; that the guardiain *ad litem* as well as the other adult plaintiffs fully understood the settlement and assented to it; and it is not strange that, having executed conveyances, they left to counsel such further action as should be deemed necessary to perfect the transfer of title. Further, in April prior to this decree, not only was the suit revived in the name of the infant heirs of Charles Bent, but on motion of the solicitors for plaintiffs their mother was appointed guardian *ad litem* and commissioner in chancery, with full power to execute deeds and carry into execution all sales or transfers of their interest in the real estate described to the defendant Maxwell. The court was therefore early advised of the fact of a proposed settlement. The consent decree shows fully the terms of the settlement, and it certainly is not straining the presumption in favor of judicial action to assume that the court would not have permitted the entry of this decree, providing for a settlement whose

terms were thus disclosed, without being satisfied that such settlement was for the interest of the minors who were under its charge.

* * * * * * * *

"It would be strange, indeed, if, when those authorized to represent minors, acting in good faith, make a settlement of claims in their behalf, and such settlement is submitted to the proper tribunal, and after examination by that tribunal is found to be advantageous to the minors and approved by a decree entered of record, such settlement and decree can thereafter be set aside and held for naught on the ground that subsequent disclosures and changed conditions make it obvious that the settlement was not in fact for the interests of the minors, and that it would have been better for them to have retained rather than compromised their claims. If such a rule ever comes to be recognized it will work injury rather than benefit to the interests of minors, for no one will make any settlement of such claims for fear that it may thereafter be repudiated. The best interests of minors require that things that are done in their behalf, honestly, fairly, upon proper investigation, and with the approval of the appropriate tribunal, shall be held as binding upon them as similar actions taken by adults."

Almost no end of cases to the same effect could be cited.

A consent decree is a judicial act as held in *Pope* v. *United States*, No. 26, decided November 6, 1944. Therein this court said:

"It is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is 'a judicial act.' *United States* v. *Swift*, 286 U. S. 106, 115; *Swift* v. *United States*, 276 U. S. 311; see also *Pacific R. R.* v. *Ketchum*, 101 U. S. 289; *United States* v. *Babbitt*, 104 U. S. 767; *Nashville, Chattanooga & St. Louis Ry.* v. *United States*, 113 U.

S. 261; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451. It is likewise a judicial act to give judgment on a legal obligation which the court finds to be established by stipulated facts; *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 333; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 388; *Equitable Society* v. *Comm'r*, 321 U. S. 560, 561; or when the defendant is in default. *Voorhees* v. *Bank of the United States*, 10 Pet. 449; *Randolph* v. *Barrett*, 16 Pet. 138; *Clements* v. *Berry*, 11 How. 398; *Cooper* v. *Reynolds*, 10 Wall. 308; *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603; *Fidelity and Deposit Co.* v. *United States*, 187 U. S. 315; *Christianson* v. *King County*, 239 U. S. 356, 372. It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly. *Renner and Bussard* v. *Marshall*, 1 Wheat. 215; *Aurora City* v. *West*, 7 Wall. 82, 104; *Clements* v. *Berry, supra;* cf. *Mayhew* v. *Thatcher*, 6 Wheat. 129. In all these cases the court determines that the unchallenged facts shown of record establish a legally binding obligation; it adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment."

Even if the validity of the judgments or decrees under attack depended upon the introduction of some evidence as to the issues involved, the merits thereof, and as to whether said judgments or decrees were in the best interests of Jackson Barnett, such evidence can be found in the compromise agreement involved herein, which, according to the record was introduced in evidence, and which contained a recitation of all the matters involved in greater and more accurate detail than could have been given by any sworn witness, or witnesses, and also in the statements which said record discloses were made to the court by counsel immedi-

ately preceding the rendition of said judgments or decrees. (R. 772-789, 672-684, 619)

Finally, we would call attention to the fact that whatever may be said about a compromise decree against an *infant* or *mentally incompetent person* when he is represented solely and exclusively by his *parent, next friend, guardian,* or *guardian ad litem,* we are not confronted solely with any such situation. Here we have a situation in which Jackson Barnett, in addition to being represented by a next friend and a guardian *ad litem,* was represented, whether wisely or not is immaterial, by the United States and by two Oklahoma probate court guardians; and the United States, by its Secretary of the Interior and its Attorney General (R. 771-772), and said two probate court guardians, after having been regularly authorized so to do by the respective probate courts which appointed them (R. 786, 796-809), consented and agreed to the judgments or decrees under attack. And in this situation, the District Court herein was not required to conduct any trial, hear any evidence, or even ascertain and conclude, for itself, which, however, it did do, that such judgments or decrees were for the best interests of Jackson Barnett.

The reasoning of those cases which hold that it takes more than the consent, agreement or stipulation of a *parent, next friend, guardian* or *guardian ad litem* of a minor or a person mentally incompetent to render a judgment or decree *res adjudicata* against the minor or mentally incompetent person is that such representatives are *per se* without power or capacity to make any admission, waiver, prejudice, representation or agreement whatsoever. However, it is well established, by this and all other courts which have had any occasion to consider the matter, that the United States, as

guardian of a restricted Indian, has the superior right and power to commence, maintain and control litigation in connection with the allotment of such Indian, and that it may compromise and settle such litigation or dismiss the same, even with prejudice, or refuse to appeal from any judgment against it in such litigation, and that its action in these respects cannot be objected to, interfered with, or circumvented by such Indian, his next friend, his guardian, guardian *ad litem*, or any other party or parties. Consequently, the District Court, had it seen fit so to do, could have made and entered the judgments or decrees under attack *merely and solely upon approval and execution of the compromise agreement herein by the United States*, acting by and through its Secretary of the Interior and its Attorney General, and *without any judicial ascertainment or determination whatsoever.*

In the case of *Conner, et al.*, v. *Cornell, et al.*, (C. C. A. 8) 32 F. (2d) 581, the court said:

> "It is argued that Abbie Conner and Nettie Conner were not parties to the action brought by the United States in the federal court, and hence are not bound by its action. This is unavailing, and, in referring to the claim that the Indian wards had not been made parties in *Heckman* v. *United States*, 224 U. S. 413, 444, 32 S. Ct. 424 (56 L. ed. 820), the Supreme Court said: 'This position is wholly untenable. There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents —whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indian's acquiescence. *It does not rest upon convention, nor is it circumscribed by rules which govern private relations.* It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its

care, and it recognizes no limitations that are inconsistent with the discharge of the national duty. When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. It was not necessary to make these grantors parties, for the Government was in court on their behalf. *Their presence as parties could not add to, or detract from the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances.* * * * *And it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question'.*" (Italics ours.)

In the case of *Mars, et al.*, v. *McDougal, et al.*, (C. C. A. 10) 40 F. (2d) 247, this court said:

"Counsel for appellants contend that the decree in cause No. 3191 is not *res adjudicata* for the reason that the United States was without authority to bring an action in behalf of Lusanna Brink and then *dismiss it with prejudice*, without receiving some consideration for such dismissal.

"It is well settled that the United States, as guardian of its Indian wards, may maintain a suit in its name to enforce restrictions upon the alienation of lands by such Indians and to set aside conveyances or contracts by which such restrictions have been transgressed. *LaMotte* v. *United States*, 254 U. S. 570, 41 S. Ct. 204, 65 L. ed. 410; *United States* v. *Noble*, 237 U. S. 74, 35 S. Ct. 532, 59 L. ed. 844; *Heckman* v. *United States*, 224 U. S. 413, 32 S. Ct. 424, 56 L. ed. 820; *Bowling & Miami Inv. Co.* v. *United States*, 233 U. S. 528, 34 S. Ct. 659, 58 L. ed. 1080.

"Since the United States, acting through its At-

torney General, has the power to maintain such a suit, *it would be a strange situation, indeed, if the Attorney General could not dismiss such suit, with prejudice upon discovery that it was groundless.* We conclude that power is vested in the Attorney General, as the head of the department of justice, to initiate, control and dismiss such a suit. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 281, 8 S. Ct. 850, 31 L. ed. 747; *United States* v. *Throckmorton*, 98 U. S. 61, 70, 25 L. ed. 93; *United States* v. *Beebe*, 127 U. S. 338, 342, 8 S. Ct. 1083, 32 L. ed. 121.

"A dismissal with prejudice is a decision on the merits and is a bar to a further action, under the doctrine of *res adjudicata. Conner* v. *Cornell*, (C. C. A. 8) 32 F. (2d) 581; *Ledbetter* v. *Wesley*, (C. C. A. 8) 23 F. (2d) 81; *Hickey* v. *Johnson*, (C. C. A.) 9 F. (2d) 498." (Italics ours.)

See, to the same effect, *Vinson, et al.*, v. *Graham, et al.*, (C. C. A. 10) 44 F. (2d) 972; *Pueblo of Picuris in State of New Mexico* v. *Abeyta, et al.*, (C. C. A. 10) 50 F. (2d) 12; *Harjo, et al.*, v. *Empire Gas & Fuel Co.*, (C. C. A. 8) 28 F. (2d) 596; *United States* v. *Dunn, et al.*, (C. C. A. 8) 288 Fed. 158; and *United States* v. *Candelaria, et al.*, 271 U. S. 432, 70 L. ed. 1023.

With respect to the power of the District Court to make and enter the judgments or decrees under attack upon the consent of the above referred to two Oklahoma probate court guardians, after they had been regularly authorized so to do by the respective probate courts which appointed them, we would call the court's attention to *Verdine, et al.*, v. *Cosden & Co., et al.*, 96 Okl. 52, 220 Pac. 329, in which the court said:

"We deem it unnecessary to go into the discussion of the facts out of which this litigation grew or

the assignments of error made by the plaintiffs in error, for that the plaintiffs in error, with the approval of the County Court having the jurisdiction of the settlement of their estate and their guardians, joined by their counsel, for a sum of money specified, have entered into an agreement satisfactory to the respective parties. *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. ed. 539; *Gusdofer* v. *Grundy*, 72 Miss. 312, 16 So. 432; *Cannor* v. *Hemphill*, 7 Tex. 184. Without regard to the merits, we are of the opinion that the settlement is to the best interest of the minors and that the motion to affirm the judgment of the trial court should be sustained and the judgment of the trial court should be affirmed."

See, to the same effect, *Carter Oil Co.* v. *Fleming*, 117 Okl. 39, 245 Pac. 833; *Harris* v. *Davis, et al.*, 170 Okl. 35, 38 P. (2d) 562; and *Derrisaw* v. *Schaffer, et al.*, (D. C., E. D. Okla.) 8 Fed. Supp. 876.

Respondents respectfully submit that the opinion of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals on the same matter; or that said opinion decided any question of local law in a way probably in conflict with any applicable local decisions; or decided any question of federal law which has not been, but should be, settled by this court; or decided any federal question in a way probably in conflict with applicable decisions of this court; or departed from the accepted and usual course of judicial proceedings, or sanctioned any such departure by the District Court; and respondents further submit that no reason exists for the grant-

ing of petitioner's petition for a writ of *certiorari*, and that such petition should be denied.

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